No. 93-1841

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

vs.

FEDERICO PEÑA,
Secretary of Transportation, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF COALITION FOR ECONOMIC EQUITY; MID-PENINSULA MINORITY CONTRACTORS ASSOCIATION; AS AMICI CURIAE SUPPORTING RESPONDENTS FEDERICO PEÑA, SECRETARY OF TRANSPORTATION, ET AL.

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CONSENT FOR FILING

This brief is being submitted with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

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INTERESTS OF AMICI CURIAE

The Coalition for Economic Equity is an *ad hoc* group, composed of individuals and organizations who joined forces in the spring of 1983 to address the problem of access to San Francisco's contracting by minority-owned and women-owned businesses. Many of the members supported the initial request of two members of the Board of Supervisors to have the Human Rights Commission of the City and County of San Francisco conduct hearings on practices of City authorities of seeking outside contractors to provide specific goods and services for their agencies. Others joined the Coalition when the results of those hearings were announced: less than 3% of city contracts in the previous year had been awarded to either minority or women prime contractors.

The Coalition has worked to inform the general public about the nature of the problem and the proposed solutions. The Coalition advocates in other forms in support of similar programs. Indeed, the Coalition intervened in Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).

The Mid-Peninsula Minority Contractors Association (MPMCA) is a group of local minority contractors, bonding together, as in times past, to assist and participate in the rebuilding and redevelopment of minority low-income communities. MPMCA is dedicated to the proposition that its members should attempt to perform the work in their community that has usually been performed by outsiders.

This organization has come together to participate in the economic and structural development of its community. MPMCA seeks to provide guidance, construction education, project estimates, information sources, and quality assurance in local construction projects. MPMCA fully expects that the organization and its members will be competing for contracts under § 502 of the Small Business Act; § 106 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 and similar programs.

SUMMARY OF THE ARGUMENT

Petitioner is requesting that this Court overrule its decisions in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990). However, the doctrine of *stare decisis* is not a doctrine that should be lightly cast aside. Precedents of this Court have established factors to be considered for determining the appropriateness of overruling or reconsidering earlier decisions, and petitioner has not shown that those factors are present in this instance. A review of the factors this Court has established as guideposts for establishing the propriety for the reconsideration or overruling of previous decisions indicates that Fullilove and Metro are well outside the standards embodied in the various factors, and therefore that these cases should not be overruled.

Fullilove and Metro constitute no departure from recent race-conscious jurisprudence established by this Court starting with Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In addition, a reversal of Fullilove and Metro would frustrate substantial reliance on these opinions in the area of race conscious relief. Finally, there has been no indication that either of these decisions have been ineffective, are out of step with the times, or should be revisited in light of new information.

This legislation is a valid exercise of congressional power under the enforcement clauses of the Civil War Amendments, and thus calls for unusual judicial deference upon review. The enforcement clauses grant Congress broad authority to address racial inequities. When doing so, Congress has wide rein to choose means with which to proceed.

A review of local contracting studies reveals that in the absence of affirmative action programs minority businesses are regularly underutilized, given their availability. The need for legislation to eradicate discrimination in government contracting is well-documented, and is still very much present. Programs such as this one are a necessary and effective step toward eradicating the effects of racial discrimination.

Finally, the delegation to state and federal agencies of authority to set the precise terms of the preferences at issue is well within constitutional bounds. Such delegation contributes to precision in tailoring the program to the affected communities.

ARGUMENT

The statute and its application in this instance are clearly constitutional under the decisions of this Court, and there is no compelling justification for overruling these decisions. For the following reasons, the decision of the Tenth Circuit in this case should be affirmed.

I. THE NECESSARY HEAVY BURDEN IMPOSED FOR THIS COURT TO DISAVOW ITS DECISIONS IN FULLILOVE V. KLUTZNICK AND METRO BROADCASTING, INC. V. FEDERAL COMMUNICATIONS COMMISSION HAS NOT BEEN MET IN THIS CASE, AND THEREFORE, RECONSIDERATION OF THOSE DECISIONS IS INAPPROPRIATE AND UNWARRANTED.

This Court has stated many times that the doctrine of *stare decisis* is one that should not be lightly cast aside. See, e.g., Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Vasquez v. Hillery, 474 U.S. 254, 266 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

In fact, the doctrine of *stare decisis* was very recently defined by this Court in Vasquez, supra at 266, as being "[t]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligent manner." The Court went on to discuss what was meant by that definition by stating that the doctrine thereby allows society to rest assured that certain legal principles would be firmly established and not subject to the changing whims of personal or popular trends. Id. Thus the Court reiterated the fact that legal precedent is controlling in the judicial sphere of this society rather than people. Principle rather than personnel must be the controlling factor. These statements must be considered within the context of

the present case.[1]

In this case there is nothing in constitutional jurisprudence that mandates a departure from this doctrine of *stare decisis*. Indeed, the issue that has been placed before this Court is one that in no way fits the traditional standards that this Court has fashioned for the overruling of decisions.

In Monell v. New York Dept. of Social Services, 436 U.S. 658, 695-701 (1978), this Court articulated four factors to be considered for determining whether decisions should be overruled. The factors discussed in Monell are as follows: whether the decision constituted a departure from prior decisions, whether overruling these decisions would be inconsistent with more recent expressions of congressional intent, whether overruling these decisions would frustrate legitimate reliance on these holdings, and whether the decisions in question misconstrued the meaning of the statute as revealed in the legislative history.[2] A careful analysis of these factors compels the determination that reconsideration and overruling of Fullilove and Metro is inappropriate and unwarranted.

A. The Decisions In Fullilove and Metro Do Not Constitute A Departure From Recent Decisions Of This Court.

Fullilove has been the seminal decision defining the appropriate boundaries of congressional power and duty to attack and eradicate all remnants of slavery and discriminatory practices perpetuated on various minority groups. Indeed, Fullilove has been cited repeatedly as the case that has outlined and defined the

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[1]The fact that this case involves a constitutional challenge does not alter the fact that the strictures of *stare decisis* are to be observed absent special justification. See, e.g., Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Planned Parenthood v. Casey, __U.S.__, __, 112 S.Ct. 2791, 2808-2809, 120 L.Ed.2d 674 (1992); Payne v. Tennessee, 501 U.S. _ , __, 111 S.Ct. 2597, 2617-2618, 115 L.Ed.2d (1991); Welch v. Texas Dept. of Highways and Public Transportation, 483 U. S. 468, 479 (1987).

[2]Because this case involves issues of constitutional jurisprudence, this factor will not be addressed.

parameters of federal attempts to remedy discriminatory practices and the monument as to the limits on race conscious relief. Compare City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 490 (1989); Harrison & Burrowes Bridge Constructors v. Cuomo, 981 F.2d 50, 56-58 (2d Cir. 1992). It has been that guidepost for fourteen and one half years, and it has been the basis for innumerable attempts to address problems of minority underrepresentation. The decision in Fullilove certainly was not a casual or incidental holding. Furthermore, there has been an enormous opportunity to reject the holding in this decision, yet there have been no steps taken in that direction until the granting of this Petition for a Writ of Certiorari. See, e.g., Ellis v. Skinner, 961 F.2d 912 (10th Cir.), cert. denied, *sub nom.* Ellis v. Card, ___ U.S. ___, 113 S.Ct. 374, 121 L.Ed. 2d 286 (1992); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir.), cert. denied, 501 U.S. ___, 111 S.Ct. 2261, 114 L.Ed.2d 714 (1991).

Similarly, Metro was decided four years ago and Fullilove provided a large part of the doctrinal basis for the decision. Thus, there is nothing in *either* Fullilove or Metro that would allow one to opine that ether decision should be wrenched from its position of bedrock law allowing Congress to attempt to remedy a rather egregious portion of our history and its mournful legacy.

B. Overruling Fullilove or Metro Would Frustrate The Considerable Legitimate Reliance on These Cases.

As discussed above, Fullilove has provided the basis for a number of statutory provisions allowing for the inclusion of minority contractors. These cases have provided the jurisprudential framework for assessing the constitutionality of comparable congressional attempts to address the underutilization of minority ability, initiative, and hard work; as well as to off-set the pervasiveness of discrimination and incomplete opportunities.

Any cursory check of Shepard's or the data bases of Lexis or Westlaw will disclose the incredible degree to which the lower courts have relied on this Court's opinion in Fullilove, and the

impact of this case before these courts and Congress.[3] *Stare decisis* protects such settled expectations. Vasquez v. Hillery, supra.

C. There Has Been No Indication That Fullilove and Metro Have Been Ineffective.

Additionally, there has been no indication that Fullilove and Metro have been ineffective or "unworkable" decisions.[4] Indeed, as section III of this brief, *infra* demonstrates, these programs and their progeny have been quite effective. Furthermore, Congress has continued to support these type of programs.

Thus, it is beyond cavil that there had been no evidencing of a lack of effectiveness or "unworkable" areas in Fullilove and Metro that would call for the overruling of these precedents.

D. There Has Been No Showing That There Is Some Necessity To Bring Fullilove and Metro Into Agreement With Experience Or Newly Ascertained Facts.

There has been no showing that the decision in either Fullilove and Metro is at odds with judicial or legislative experience. Indeed, as established in section III, *infra*, these cases have been shown to be the foundation for the most successful means of remedying some of the problems facing certain segments

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[3]Since Fullilove, Congress has enacted other minority set-aside provisions, e.g., Highway Improvement Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1987); International Security and Development Assistance Authorization Act of 1983, Pub. L. No. 98-151, 97 Stat. 964, 970-71 (1983).

[4]Although these decisions may have engendered opposition, this in no way indicates that they are "unworkable". Opposition and unpopularity do not necessarily call for reversal or even review. See Brown v. Board of Education, 349 U.S. 294, 299-301 (1955); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985); Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2809, 120 L.Ed.2d 674 (1992).

of our society.

Thus, there is no reason for this Court to overrule either of these decisions.

II. THIS LEGISLATION IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE ENFORCEMENT PROVISIONS OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The enforcement clauses of the Civil War Amendments grant Congress broad power to address racial inequities in this country. Indeed, it is established that these amendments impose upon Congress the responsibility to do so: "Congress properly may – and indeed must – address directly the problems of discrimination in our society." Fullilove at 499 (Powell, J., concurring).

As discussed below, when Congress acts under the enforcement clauses it employs the broadest remedial power of any governmental organ. The well-established need for judicial deference to the decisions of Congress is correspondingly strongest in this context. The legislation at issue in this case is a valid exercise of congressional power under the enforcement clauses of the Thirteenth and Fourteenth Amendments; to overturn it would be to infringe upon Congress's constitutionally mandated role.

A. The Enforcement Clauses of the Civil War Amendments Grant Broad Power to Congress and Require Unusually Strong Judicial Deference.

The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution were enacted in rapid succession with a common goal: "the construction of a penumbra of legal commands ... designed to raise the race of freedmen from the status of inferior beings – a status imposed by the system of chattel slavery – to that of free men and women, equal participants in the hitherto white political community consisting of the 'people

of the United States'."[5] This court has referred to "freedom of the slave race ... and protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him" as the "pervading purpose" found in these three amendments. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872). Central to the fulfillment of this common purpose is each amendment's explicit grant of authority to Congress to enforce the amendment's guarantees through legislation.[6]

For more than a century, the Supreme Court has consistently held that the enforcement provisions constitute broad grants of power to Congress to fulfill the purposes of the Civil War Amendments.[7] The Civil War Amendments have long been understood as effecting a dramatic power shift: the amendments broadly expanded the power of the federal government, while severely limiting the power of the states. See Ex Parte Virginia,

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[5]A. Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers Law Review 387, 389 (1967).

[6]Amendment XIII, Section Two provides:

> Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV, Section Five provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV, Section Two provides:

> The Congress shall have power to enforce this article by appropriate legislation.

[7]See, e.g., Ex Parte Virginia, 100 U.S. 339 (1879) (the enforcement provisions as a group); Katzenbach v. Morgan, 384 U.S. 641 (1966) (section 5 of the Fourteenth Amendment); Fullilove, supra (section 5 of the Fourteenth Amendment (Burger, C.J., joined by White, J. and Powell, J., plurality opinion)); Id. at 500-01 (Powell, J., concurring); City of Richmond v. Croson, supra at 488-89 (1989) (section 5 of the Fourteenth Amendment (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion)); South Carolina v. Katzenbach, 383 U.S. 641 (1966) (section 2 of the Fifteenth Amendment); Jones v. Mayer, 392 U.S. 409 (1968) (section 2 of the Thirteenth Amendment); Runyon v. McCrary, 427 U.S. 160 (1976) (section 2 of the Thirteenth Amendment).

100 U.S. 339, 345 (1879) (the Civil War Amendments were designed "to be ... limitations on the power of the states and enlargements of the power of Congress."); City of Richmond v. J.A. Croson, supra at 521-22 (1989) (Scalia, J., concurring). These enlargements of the power of Congress authorize the legislation at issue here, and require unusual judicial deference to congressional judgments about ends and means in the exercise of this power.

This Court traditionally is highly deferential when passing on the validity of any act of Congress, even when constitutional values are at issue. Justice Holmes referred to constitutionality review of acts of the national legislative branch as "the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., joined by Brandeis, J., Sanford, J., and Stone, J., concurring).[8] Unlike when this Court is reviewing the acts of a state or local political body, in this context a finding of unconstitutionality by the Supreme Court would upset final action taken by co-equal branches of government. Congressional legislation such as the Small Business Act and the Surface Transportation Assistance Act is the considered judgment of both houses of Congress, and has been approved by the President – thus the long history of judicial deference and the presumption of constitutionality is appropriate in

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[8]See also Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 421 U.S. 94, 102 (1973) (in evaluating First Amendment claim, Supreme Court "must afford great weight to the decisions of Congress."); Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting with approval Blodgett and C.B.S.); United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963) ("strong presumptive validity ... attaches to an Act of Congress"); Walters v. National Association of Radiation Survivors, 468 U.S. 1323, 1324 (1984) ("[P]resumption of constitutionality ... attaches to every Act of Congress" (Rehnquist, J., as Circuit Justice)); Fullilove, supra at 472 (quoting Blodgett with approval); Morrison v. Olson, 487 U.S. 654, 704 (1988) ("Where a private citizen challenges action of the Government ... harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches ...." (Scalia, J., dissenting)).

this instance.[9]

This traditional deference is even greater when Congress acts in the area of race relations; here the Civil War Amendments' enforcement provisions give Congress special authority to act, above and beyond its normal powers. "These are of course not the only sources of congressional power to enact civil rights laws .... But the post-Civil War additions, unlike the original grants, were born of a special concern with racial discrimination; and the civil rights powers they confer are potentially the most far-reaching." G. Gunther, Constitutional Law, Twelfth edition, 878-79 (1991). See also Oregon v. Mitchell, 400 U.S. 112, 129 (1970) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." (Black, J.)).

As such, judicial scrutiny of congressional action in the area of race relations is correspondingly more limited than in other contexts. Justice O'Connor has noted that "Congress has considerable latitude, presenting *special concerns for judicial review*, when it exercises its 'unique remedial powers ... under § 5 of the Fourteenth Amendment." Metro at 3030, quoting Croson at 488 (emphasis added). This Court's posture when reviewing congressional acts in the area of race relations is akin to its stance in another area of special deference: review of congressional actions relating to the military. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 68 (1981) ("In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation of the legislative branch.").

Congress needs wide rein with which to further this overriding interest; judicial scrutiny is correspondingly narrower. The Court should keep these concerns in mind when it undertakes its review of congressional action in this case.

B. The Legislation at Issue in this Case is a Valid Exercise of Congressional Power Under the Thirteenth Amendment.

The Thirteenth Amendment abolished slavery in this country.[10] Of course, Congress's areas of authority under the enforcement provision of the Thirteenth Amendment "extend far beyond the actual imposition of slavery or involuntary servitude." Griffin v. Breckenridge, 403 U.S. 88, 105 (1971). Since the Civil Rights Cases, supra, it has been clear that Congress has the power to pass legislation to eradicate all "badges and incidents of slavery ...." Id. at 20. It is Congress, not any court, that makes the final determination as to what constitutes a badge or incident of slavery; this determination is subject only to rationality review by courts. "[C]ongress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Mayer, 392 U.S. 409, 440 (1968); Griffin, supra at 105. The Mayer court went on to uphold the

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[9]In addition, this Court has repeatedly held that Congress has broad power under the Spending Clause to distribute funds as it sees fit. Again, judicial deference is called for: "The discretion [in exercise of the spending power] ... is not confided in the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is familiar law." Helvering v. Davis, 301 U.S. 619, 640 (1937). Congress's choices may only be overturned by the courts if "by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to Congress." Id. at 644.

Congress is also vested with a special responsibility in spending matters to ensure that its money does not contribute to the perpetuation of racial inequities. "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." Lau v. Nichols, 414 U.S. 563, 569 (1974). This Court has long recognized the strong governmental interest in ensuring that state funds do not support racial discrimination, public or private. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973); Gilmore v. City of Montgomery, Alabama, 417 U.S. 556 (1974).

[10]"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." United States Constitution, Amendment XIII, Section One.

congressional legislation at issue after applying a rational-basis test: "Nor can we say that the determination Congress has made is an irrational one." Mayer at 441.

Congress could rationally have decided that dispensation of government funds was an appropriate area for exercise of its Thirteenth Amendment powers. Government action such as contract awards possesses strong symbolic value: even decisions that are small in dollar amount carry the state's imprimatur. Systematic underutilization of available disadvantaged business -- usually minorities and women -- sends a destructive and hurtful message, one that resonates with the history of societal devaluation that the Civil War Amendments were aimed at eradicating. Congress could rationally have concluded that it didn't want this message sent, and employed its Thirteenth Amendment power to ensure that it wouldn't be.[11]

Of course, it is axiomatic that there is no state action requirement for Congress to act under the Thirteenth Amendment; the amendment's prohibition of slavery obviously applies to private individuals. If Congress, using its section 2 power, can right the wrongs of -- and exert control over -- purely private individuals (as it did with Supreme Court approval in Mayer, supra, Griffin, supra, and Runyon v. McCrary, 427 U.S. 160 (1976), it must necessarily be able to do the same with regard to federal and state agencies. Here, Congress has taken steps to ensure that these agencies fairly utilize disadvantaged businesses. Thus, this statute is clearly valid as an exercise of the broad grant of authority conferred by section 2 of the Thirteenth Amendment.

[11]Note that Congress need not explicitly state in the legislation at issue that it is acting under its Civil War Amendment enforcement powers. See EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'" in order to utilize its section 5 powers). This comports with general principles of court review of congressional legislation: "The ... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Lloyd W. Miller Co., 333 U.S 138, 144 (1948).

C. The Legislation at Issue in this Case is a Valid Exercise of Congressional Power Under the Fourteenth Amendment.

Similar to section 2 of the Thirteenth Amendment, section 5 of the Fourteenth Amendment is a broad grant of power, conferring upon Congress wide discretion to determine both which areas require attention in order to fulfill the promise of the Fourteenth Amendment, and the best means by which to proceed. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). This statement of broad congressional power was reaffirmed in Fullilove, supra at (Burger, C.J., joined by White, J. and Powell, J., plurality opinion), and in City of Richmond v. Croson, supra at 490 (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion).

In exercising its section 5 power, Congress is not bound by judicial determinations as to what constitutes an equal protection violation. Katzenbach, supra at 648.[12] As with the Thirteenth Amendment, Congress is free to make its own determinations as to which areas need its attention in order to fulfill the promise of the Fourteenth Amendment. In rejecting arguments to the contrary, this Court has stated:

> A construction of § 5 that would require a judicial determination [of a prior Fourteenth Amendment violation] as a condition of sustaining the congressional enactment, would depreciate both

[12]Accord, Croson, supra at 490 ("The power to 'enforce' [the dictates of the Fourteenth Amendment] may at times also include the power to define situations which *Congress* determines threaten principles of equality ...." (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion; emphasis in original)) and Fullilove, supra, at 502 ("It is beyond question ... that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects." (Powell, J., concurring)).

> congressional resourcefulness and congressional responsibility for implementing the amendment. It would confine the legislative power in this context to [an] insignificant role ....

Katzenbach, supra at 648.

As with the Thirteenth Amendment, courts review Congress's determinations of this nature under a highly deferential standard, akin to rationality review. "It was for Congress ... to assess and weigh the various conflicting considerations .... It is not for us to review the congressional resolution .... It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." Katzenbach, supra at 653.

Congress's affirmative power under the Fourteenth Amendment parallels that granted by section 2 of the Fifteenth Amendment, an analogous enforcement provision.[13] In City of Rome v. United States, 446 U.S. 156, 177 (1980), this Court upheld congressional action under section 2 of the Fifteenth Amendment that was not aimed at remedying past violations of section 1. Id. at 177. Similarly, under section 5 of the Fourteenth Amendment, Congress doesn't have to wait for a violation of the Amendment's other provisions in order to act; the enforcement clause grants power to take proactive steps to further the amendment's goals. This comports with the original understanding of the Republican dominated Congress that drafted and ratified the Fourteenth Amendment, as demonstrated by their passage of the various Freedmen's Bureau Acts, providing affirmative aid to ex-

[13]It is important to note that there is *no* state action requirement for congress to act under its section 5 power. Congress's role in furthering the aims of the Fourteenth Amendment is not dependent on the behavior of states and localities. On the contrary, section 5 grants Congress the power to take *affirmative steps* to advance the Amendment's goals. Congressional power under section 5 "may at times also include the power ... to adopt prophylactic rules to deal with [situations in which the 'principles of equality' are threatened]." Croson, supra at 490, (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion (citing with approval Katzenbach, supra at 651)).

slaves.[14]

Congress could rationally have determined that government contracting, with its well-documented history of underutilization of available disadvantaged businesses, was a situation that required attention in order to advance the goals of the Fourteenth Amendment. As noted above, Congress need not explicitly note the source of its power in order to utilize the various enabling clauses of the Constitution. See § II, B, *Ante*.

Even if there were a state action requirement, it would be met in this instance because over eighty percent of the funds that reach private individuals under this legislative program first go through state governments. See, e.g., the application of STAA and STURAA[15] at issue in Ellis v. Skinner, supra (State of Utah, as a condition of receipt of federal highway funds, complied with the DBE program established by STAA and renewed by STURAA).

Although no state received or distributed federal funds in petitioners' scenario -- funds went through CFLHD directly to Mountain Gravel & Construction Company -- such a situation is the exception rather than the rule under this program. However, petitioners have challenged this statute as a whole. The role of State agencies in acting as a conduit for federal funds, and in making the final contracting decisions in most cases, clearly establishes a level of involvement that would satisfy a state action requirement. Therefore, this legislation is fully authorized under Congress's section 5 powers, and thus calls for a highly deferential posture upon judicial review.

[14]See Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae*, 10-53, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811, October Term, 1976).

[15]The Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424, § 105(f), 96 Stat. 2097 (STAA), and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, § 106(c), 101 Stat. 132, 145 (STURAA).

D. Congress Has Chosen a Permissible Means With Which to Act Under the Enforcement Clauses of the Civil War Amendments.

Congress has wide discretion as to the means to be employed in remedying the effects of past discrimination, and in enacting prophylactic measures to prevent future discrimination. Almost half a century ago, this Court pointed out that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 603 (1949) (Jackson, J., joined by Black, J., and Burton, J., plurality opinion). As discussed above, judicial deference to congressional choices is particularly appropriate when Congress is utilizing its broad grants of power under the enforcement clauses of the Civil War Amendments.[16]

There is a natural tension between the well-established deference to congressional choices described above and the need to scrutinize Congress for equal protection violations. In Metro, supra, this Court resolved that tension by applying intermediate scrutiny to non-remedial congressional action that classified on the basis of race. Metro at 3008. The factors arguing for relaxed scrutiny are even stronger here than they were in Metro.

First, this program benefits disadvantaged businesses, whether or not the disadvantaged business is woman- or minority-owned. The Court-approved program in Metro, by comparison, disbursed governmental benefits on race-based lines. Second, the legislation at issue in this case is authorized by the enforcement clauses of the Thirteenth and Fourteenth Amendments, as discussed above. The enforcement clauses give Congress much greater power than that of the states as to choice of means with which to remedy discrimination. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) ("[O]verriding national interests ... may justify

[16]See Metro, supra at 3030: "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers ... under § 5 of the Fourteenth Amendment." (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion (quoting Croson, supra, at 488)).

selective legislation that would be unacceptable for an individual state.").

Validity as an exercise of enforcement clause power sets the statutes apart from the program at issue in Metro; the lack of a section 5 justification for the Metro program was a key component of Justice O'Connor's dissent. See Metro at 3030-31. These two points about the legislation involved here -- its race-neutrality at the contract-distribution level and its status as an exercise of enforcement clause power -- make Congress's choice of means much less controversial than the Court-approved choice in Metro.[17]

The extra latitude granted Congress by the enforcement clauses can, in some circumstances, authorize even race-conscious congressional measures. "[W]e reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' matter." Fullilove, supra at 482. Furthermore, this Court has approved race-conscious remedial measures taken by both federal courts and states,[18] and "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove at 484.

In addition, the Republican dominated Congress that originally ratified the Fourteenth Amendment had no notion that it would prohibit affirmative, race-based congressional action. The

[17]Note also that, as those challenging the Fullilove program pointed out, the case for constitutionality of the Small Business Act is stronger than that for Fullilove's program, which of course also received Supreme Court approval. See Petitioners' brief in Fullilove, characterizing Small Business Act section 8(d) as "racially neutral," and noting that "Congress has removed from the amendment to the Small Business Act the two unconstitutional thorns in the [legislation at issue in Fullilove]."

[18]See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971) (upholding court injunction requiring school board to use racial classifications in desegregating school system); United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (upholding race-conscious state legislative redistricting plan).

Thirty-ninth Congress passed the 1866 Freedmen's Bureau Act,[19] a comprehensive and explicitly race-conscious measure, less than a month after their approval of the Fourteenth Amendment.[20] Of course, this Court in Metro approved a congressional race-conscious measure even without the mitigating factors of (1) employment of the enforcement clauses, and (2) a remedial aim. The non-race-conscious measure at issue in this case is clearly a legitimate means for Congress to exercise its broad power under the enforcement clauses.

III. WITHOUT MINORITY BUSINESS ENTERPRISE PROGRAMS AS EMBODIED IN THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 AND THE SMALL BUSINESS ACT, MBEs WOULD CONTINUE TO OPERATE AT A DISADVANTAGE.

Minority Business Enterprise (MBE) programs have had a significant positive impact on the ability of minority owned businesses to survive and, sometimes, to thrive in today's economy. Without these programs, many MBEs would be unable to compete, thereby perpetuating the economic disadvantage experienced in minority communities. Experience and logic demonstrate that barriers still exist which exclude MBEs from contracting opportunities available to similarly situated non-minority businesses. As a result, MBEs remain underutilized as government contractors. This, in turn, reduces competition in the marketplace.

An examination of programs which have been in effect shows not only that they have been effective in raising minority participation in contracting opportunities, but that race neutral policies intended to eliminate discriminatory barriers are insufficient to remedy the inequality faced by MBEs.

Existing MBE programs have been a positive social

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[19]14 Stat., c. 200, at 173-177 (1866).

[20]See Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae*, 10-53, in Regents of the University of California v. Bakke, supra (No. 76-811, October 1976 Term).

development: they raise minority employment and open up opportunities previously denied to a large sector of society because of race or ethnicity. The SBA program (15 U.S.C. § 644(g)) adopted by Congress as implemented by the Federal Lands Highway Program Transportation through the subcontracting compensation clause program, is a desirable, appropriate, cost-effective, constitutional, and necessary method to remedy discrimination against MBEs.

A. Barriers To Equality In Contracting Continue To Exist.

Despite efforts to eliminate discrimination in this country, MBEs continue to be disadvantaged as compared to non-minority contractors in obtaining contracting opportunities. Existence of laws and regulations outlawing discrimination have not yet leveled the playing field.

Below, several utilization studies commissioned by public entities in the San Francisco Bay Area and across the country following this Court's decision in City of Richmond v. J.A. Croson Co., supra are examined.[21] These studies review governmental contracting awards to assess the need for MBE programs. Among other things, the studies examine the

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[21]National Economic Research Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the San Francisco Redevelopment Agency (April, 1993); National Economic Research Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the City Of Hayward (March, 1993); National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by Contra Costa County (May, 1992); BPA Economics, Mason Tillman Associates, et al., MBE/WBE Disparity Study for the City of San Jose (1990); Massachusetts Commission Against Discrimination, Public Hearings on M/WBEs: Report, Findings and Recommendations (Dec. 1990); Brimmer and Marshall, Atlanta Disparity Study, (1990); Conta and Associates, Milwaukee Metropolitan Sewerage District Disparity Study (1990); and MGT of American, Inc., City of Tallahassee MBE Disparity Fact-Finding Study, Final Report (1990). For the most part, this brief focuses only on the construction contracting aspect of these studies because the program before this Court concerns construction contracting.

availability of minority contractors and the utilization rates of minority contractors. They then compare availability of contractors with the utilization of those contractors to determine whether they are receiving the expected percentage of available contracts. This method demonstrates whether or not minorities are underutilized as compared to their availability. These studies uniformly conclude that barriers still prevent minority-owned business enterprises from obtaining their expected share of government contracts.

In addition to statistical analyses, these studies typically include anecdotal evidence regarding MBEs' contracting experiences. The public entities hold public hearings, conduct personal interviews, survey MBEs in the appropriate geographic area, review case filings and court decisions involving discrimination claims, review the academic literature on discrimination, review reports prepared by and for government agencies on discrimination, and review newspapers for accounts of discrimination in the Bay Area and elsewhere. Every study showed that discrimination continues to prevent minorities from competing on an equal footing with non-minorities.

For example, in Hayward large numbers of construction MBEs reported experiencing discrimination in the following areas: applying for commercial loans, applying for a bond, applying for commercial insurance, attempting to hire workers from union hiring halls, obtaining quotes from suppliers, receiving requests for bids, applying for membership in trade associations, and other dealings with trade associations. Hayward Study, Table 6.6.

Similar findings were true in Atlanta where the study concluded that Atlanta's "minority entrepreneurs have a lower success rate in obtaining loans and bonding and procuring contracts regardless of their levels of education, training, and business-related experience." M.F. Rice, Justifying State and Local Government Set-Aside Programs Through Disparity Studies in the Post Croson Era, Vol. 52, No. 5, Public Administration Review (September/October 1992) at 486. The study also found "marketplace discrimination in bidding opportunities and bonding, bid manipulation, price discrimination by suppliers, customer/end user discrimination, discrimination in financing and stereotypical attitudes of customer and professional buyers." Id.

This underutilization of MBEs cannot be separated from

race discrimination. For instance, the San Francisco Redevelopment Agency (SFRA) study found that a sizable proportion (approximately 60%) of M/WBE construction firms which responded to its survey had experienced at least one instance of discrimination in the course of business dealings in the last five years. Reported discrimination was particularly high for African-American business owners, eighty-one percent of whom reported they had experienced discrimination during the previous five years. SFRA Study at xi.

MBEs' reports that they continue to face significant barriers and discrimination in contracting is borne out in a study conducted by Timothy Bates of the Woodrow Wilson Center. T. Bates, Assessment of the New Jersey, New York City Area Small Business Construction Section (October 1993). This study compared non-minority and minority construction business owners with similar educational attainment and years in business. The study establishes that "[t]he non-minority owners who failed to finish high school . . . are much more successful at finding work than their minority cohorts . . . [and] are much larger and more likely to stay in business than those headed by minorities lacking high school degrees." The report suggests that the reason for this differential is that "non-minorities have preferential access to work; they are the in-group while minorities are the out-group." Id. at v-vi.

Furthermore, when looking at non-minority and minority firms and length of time in business -- a factor which can predict success:

> non-minority start-ups in construction face less of a lag than minorities in generating substantial revenues: firms in business for a year or two show a particular advantage over minority firms of the same age. Once again, it appears that non-minorities entering construction self-employment often have immediate access to the networks that provide them with work, while minority firms must build up these contacts with networks gradually during their early years of operation. Many MBEs never survive the slow start-up phase."

Id.

Moreover, evidence of continuing barriers against MBEs in the absence of affirmative action programs has been demonstrated in the studies analyzed in this brief. MBEs consistently report that their only subcontracting opportunities come with government programs requiring affirmative action. The San Francisco Redevelopment Agency reported that over 75% of the 95 M/WBE construction firm owners who responded to its surveys indicated that prime contractors that use their firms to meet M/WBE requirements on public-sector projects, seldom or never use their firms on projects that do not have M/WBE requirements. SFRA at x. Moreover, in Hayward, California, the study found that approximately 50% of the survey respondents are seldom or never used by prime contractors for projects that do not have M/WBE goal requirements. Hayward Report, Table 6.5 An even higher percentage of those surveyed in the Contra Costa County study reported that they were not used on projects without MBE requirements. Sixty-two percent reported they were never used on projects without MBE requirements and an additional 23% reported they were only used infrequently. Table 6.4 at 219. Similarly, in Milwaukee, Wisconsin the study found that approximately 75 percent of black-owned businesses and 32 percent of Hispanic-owned businesses affirmed the existence of racially motivated obstacles within the Milwaukee construction marketplace. M.F. Rice, Id. at 486. These findings establish that without affirmative action programs many MBEs would find it extremely difficult to survive.

B. Minority Businesses Are Underutilized In The Absence of Programs Designed To Increase Their Participation.

After Croson was decided, many public entities suspended their MBE programs in the absence of a disparity study. In these jurisdictions, minority contracting plummeted. In North Carolina, for example, MBEs' share of state Department of Transportation contracts fell by more than half to 2.9% from their previous share of about 7.2% of the total dollar value of the contracts awarded. Contract Awards Slump After State Eases Goals, Engineering News Record, Vol. 228, No. 2 at p.25.

The pattern demonstrated in the Hayward Study is typical

of other local governments. An examination of the City's 316 construction projects under $100,000 during the relevant time frame showed that MBEs had been underutilized at a statistically significant level. Significantly, no MBE group received more than 31% of their expected share of construction projects. Hayward Study at 5-14. Furthermore, overall MBE utilization on subcontracts when its MBE program was not operating was below overall MBE availability, indicating underutilization.[22] Id. at 5-14 - 5-15.

The same underutilization problem was found in Contra Costa County, California where MBE prime and subcontractors were underutilized by the county. Contra Costa County Report at xii, Table A. African Americans' prime contractors received no contracts, Asians received 39% of the contracting dollars compared to their availability and Hispanics received 78% of their expected contracting dollars. Id. The same pattern held true for African American and Hispanic subcontractors which received 32% and 69% of the expected dollars, although Asians received 3 times the expected amount.[23] Id. However, once the County established goals, minority utilization of both prime contractors and subcontractors increased. Contra Costa County Study at 148-149.

Similar results were found for San Jose, California as well. Before an MBE program was initiated, the difference between the actual and the expected number of contracts was statistically significant for both prime contractors and subcontractors. San Jose Report, Vol. 1 at III-2.[24] After the program was in place, the

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[22]Insufficient data was available to conduct a disparity test for large construction contracts. Hayward Report at 5-14.

[23]The authors propose as an explanation that Asian construction subcontractors did well because one or two firms received large subcontracts. Contra Costa County Report.

[24]The City's study demonstrates a significant increase in MBE participation on its contracts in 1987-89 when an MBE program was in place over the years 1981-82 prior to the institution of an MBE program. San Jose Study, Vol. 1 at III-3. It should be noted that despite the increase in minority participation, statistically significant under-utilization of MBEs remained despite the existence of an MBE program.

number of minority contractors participating on City construction projects dramatically increased. However, evidence of underutilization remained. Id., Vol. 1 at III-15-16.

These findings were echoed in the Tallahassee, Florida study which determined that for the years 1973 to 1975 no minority construction contractors received city contracts. In 1976, minority construction firms' share of the contracts remained at less than one percent of the total contracts. In fact, contract awards to minority construction firms did not exceed one percent until 1982 when the amount awarded was 1.25 percent. The best year for contracts awards to MBEs was 1987 when a total of prime and subcontractor awards totalled approximately 24 percent. Id. at 486-87.

The experience in Boston, Massachusetts also attests to the need for affirmative action programs designed to increase minority participation in government contracting where a program was in effect during the 1980s. According to census population statistics from 1980, African-Americans in the construction industry were underrepresented at a rate of 40 percent. Five years later, in the 1985-87 period, underrepresentation of African-Americans had declined to 30%. City of Boston Study of Minority and Women Business Enterprises, 1993 at 190-191. It appears that most, if not all, of the increased opportunity came through contracts in the public sector as a result of state affirmative action programs. In Boston, minority firms represented less than one percent of the professional and contracting firms employed in the private sector in the same period. Id. at 191. This is true in all the utilization studies examined herein.

Furthermore, even where preference programs are in place, white males continue to receive the lion's share of public contracts. Thus in San Francisco, California, in 1991-92, MBEs received only 7.3 percent of the City's contract money, an increase of almost one percent over the previous year. S. Oring, City Contracts Up 41% for Women, Minorities, San Francisco Business Times (January 8, 1993).

C. Race-Neutral Efforts To Provide Minority Businesses a Fair Share of Government Contracts Have Proven Insufficient.

Utilization studies typically examine race-neutral attempts to eliminate discrimination against MBEs to determine whether a race-conscious program is necessary. These studies universally reject race-neutral means as sufficient, standing alone, to create equality between minority and non-minority contractors.

The City of San Jose provides a striking example. The City had a race-neutral small business program in effect for the entire period covered by its study. The report concluded that

> The fact that statistically significant disparities were found while these programs were in effect strongly suggests that race-neutral methods alone have provided, at best, an inadequate means of addressing problems associated with discriminatory practices against minority and female construction contractors.

City of San Jose Study, Vol. 1 at III-4. The same conclusion was reached in the City of Hayward Study where a variety of race-neutral activities and programs to encourage small business participation had been undertaken. Activities included outreach efforts, improved contracting and procurement practices and education. The study concluded: "Race-neutral measures have not succeeded in Hayward and there is limited evidence that they have worked elsewhere." Hayward Study at xv.

D. Implementation of Race-Conscious Contracting Programs Has Proven to Be Good Public Policy, as Increased MBE Participation in Government Contracting Results in an Increase in Minority Employment.

It hardly needs saying that unemployment in minority communities is extremely high, much higher than the rate in non-minority communities. MBE programs impact this endemic problem because they tend to hire a larger proportion of minorities than do non-minority-owned businesses. In fact, most of the workers employed by black-owned businesses are minorities. T. Bates, Do Black-Owned Businesses Employ Minority Workers? New Evidence, Review of Black Political Economy (Spring 1988)

at 51. The pattern is the same regardless of the size of the firms and is true for the construction industry as well as others. Id. "While 61.2 percent of the non-minority business universe (excluding firms with no employees) has no minority employees, black employers with no minority employees make up only 4.6 percent of the corresponding black universe." Id. at 52. In fact, a large majority of black-owned firms (86 percent) rely on minority workers to fill over 50 percent of their employee needs. Thus by increasing contracting opportunities for MBEs, government also increases job opportunities for the segment of society with the highest rate of unemployment. Furthermore, expanded MBE programs have a multiplier effect, increasing the pool of available minorities as business owners. "Growth of minority firms "has the potential to offer expanded work experience in the construction industry to younger minority employees. These individuals, in turn, will be the next generation of minority construction firm owners." Id. at 64.

IV. SECTION 502 OF THE SMALL BUSINESS ACT IS A CONSTITUTIONAL DELEGATION OF CONGRESSIONAL AUTHORITY.

The United States Constitution authorizes Congress to "provide for the ... general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. U.S. Const. art. I, Section 8, cl.1; amdt. 14, Section 5. By enacting the Small Business Act (SBA), Congress merely exercised these powers. Section 502 of the SBA, 15 U.S.C. § 644 (g), provides the statutory authorization for the President and federal agencies to establish utilization goals for disadvantaged small businesses. The SBA furnishes specific guidelines for the President and federal agencies, including the Federal Lands Highway Program (FLHP), to follow and ensures ongoing congressional oversight through a mandatory, detailed reporting system to Congress.[25]

[25]The detailed reporting requirements of SBA Sections 644 (h)(1) and (2) require each federal agency's annual report to Congress to include: the agency's goals and performance in attaining the goals; an analysis of any failure to achieve the Government-wide goals or individual agency goals; actions planned by the agency with respect to goals in the succeeding fiscal year; the number and dollar value of contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and the number and dollar value of subcontracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Because Congress had the authority to enact the SBA and because the legislation contains inherent safeguards, the SBA is a permissible delegation of Congress' authority to establish utilization goals for disadvantaged small businesses. "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, 409 (1928).[26]

A. The Cost to the Federal Government of Undertaking Utilization Studies Throughout the Country Would be Prohibitive.

All the studies cited in this brief are well over 200 pages. They include complicated statistical analyses and extensive fact gathering, including holding hearings, conducting surveys, and research. The cost of each one of these studies is extremely high. For example, the City of San Diego, California decided to fund a $750,000 disparity study in 1993. C. Van Housen, Judge Blocks Program to Hire Minority Women Contractors, San Diego

[26]Only twice in this Court's history has it invalidated legislation on improper-delegation grounds. See Schechter Poultry v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). In the sixty years subsequent to these National Industrial Recovery Act cases, *all* Supreme Court cases involving the delegation doctrine have uniformly upheld broad delegations of rulemaking power to agencies. By challenging the SBA as an impermissible delegation of Congress' legislative authority, Petitioner ignores the vast majority of the Court's precedent in this area.

Business Journal (October 4, 1993) at 70. In order for the federal government to undertake studies in each state to determine state-wide (or even local geographic area-wide) need for MBE programs would be staggering.

Given the plethora of information in the public domain available to Congress and to federal agencies, it is a much more sensible approach to allow Congress to delegate its power to determine what affirmative action programs are appropriate to federal agencies which are directly involved in the contracting process and aware of the need to increase MBE participation in government contracting. Indeed, with regard to the construction industry, this Court has taken judicial notice of the pervasiveness of discrimination. United Steelworkers of America v. Weber, 443 U.S. 193, 198 n.1 (1979).

B. The Subcontracting Compensation Clause Program Does Not Require the Federal Agency to Conduct a Croson Inquiry Because Fullilove Controls.

In order to fulfill its congressional mandate under the SBA, in 1979, the Department of Transportation through the FLHP, implemented the subcontracting compensation clause program (SCC). To qualify for eligibility under the SCC program, a small business must demonstrate through an annual certification process that it is socially and economically disadvantaged. The SCC and its eligibility requirements comport with the SBA's definitions of socially and economically disadvantaged business concerns as defined by Congress. As such, the SCC provisions carry a heavy presumption of validity. When Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting agency action is entitled to deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Petitioner argues that, before the FLHP– a federal agency acting pursuant to a congressional mandate– may implement and administer the SCC program, it must conduct the inquiry set forth in Croson. As the Court of Appeals for the Tenth Circuit stressed, "The question of congressional action was not before the Court in Croson." Adarand Constructors, Inc. v. Peña 16 F.3d 1537, 1544 (10th Cir. 1994). Under Croson, strict scrutiny must be applied

when Congress does not act, and instead, public state and/or local entities impose programs containing racial classifications.

Unlike Congress, state and local governments do not possess affirmative grants of authority from Section 5 to enforce the Fourteenth Amendment. See Fullilove, supra. For this reason, local and state programs are not entitled to the same level of deference as congressional programs. Race-conscious affirmative action programs mandated by Congress are only subject to intermediate scrutiny. Metro, supra. As explained by Judge Posner in Milwaukee County Pavers Ass'n v. Fielder, supra (1991), the "joint lesson of Fullilove and Croson" is "that the federal government can, by virtue of thee enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do."

In any case, the program at issue here is a congressional program. Not only was it authorized by Congress, but it was mandated by Congress. The Small Business Act directs each federal agency to establish goals for small business participation in federal procurement contracts. By implementing the SCC program, the Department of Transportation's FLHP was merely complying with a detailed congressional directive. The SCC program can only properly be characterized as a program of the federal government. Nothing in its implementation or administration mystically transforms it into a state or local program, subjecting it to Croson's findings requirement or standard of scrutiny.

As with a state, if Congress can require a federal agency to comply and implement its affirmative action legislation, agency action to create the means of fulfilling the legislation's requirements must also be permitted. S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 767 (11th Cir. 1991) (if Congress developed the program, as opposed to a state or local government, intermediate scrutiny is appropriate.); Ellis, supra at 916 (Fullilove applies to state implementation of federal affirmative action program); Tennessee Asphalt Co. v. Farris, 942 F. 2d 969, 975 (6th Cir. 1991) (state's compliance with mandates of federal scheme is nothing more than compliance with federal law and Fullilove controls); Milwaukee County Pavers Association v. Fiedler, supra (insofar as state complies with federal law Fullilove controls); Harrison & Burrowes Bridge Constructors v. Cuomo,

743 F. Supp. 977, 1005 (N.D.N.Y. 1990) ("If Congress can require states to comply with race-conscious requirements, state legislation enacted to create the means of fulfilling those requirements must also be permitted," (quoting Milwaukee, supra at 1545-46)).

Under the traditional standards governing the delegation of authority, the FLHP was fully empowered to implement the SCC program. "Congress... took a power which [it] possessed and, instead of exercising it directly, chose to delegate it. This is the process by which all federal regulations are promulgated and to forbid it would be to necessarily dismantle the entire structure of the Executive Branch." Hampton v. Mow Sun Wong, supra at 124 (1976) (Rehnquist, J., White, J., and Blackmun, J., dissenting).

CONCLUSION

Petitioners are asking this Court to reconsider settled law, and carry a heavy burden in doing so. As detailed above, this Court has set forth the factors that can lead to a reversal of prior decisions, and none of these factors is present here. Furthermore, a review of the various post-Croson studies leads to a clear conclusion: in the absence of DBE programs, underutilization of available minority businesses is dramatic and persistent.

The Civil War Amendments granted Congress a special role in remedying the effects of racial discrimination: it has power in this area broader than that of any other governmental entity, and the duty to use that power to fulfill the goals of the amendments. The Small Business Act and the Surface Transportation Assistance Act of 1982 are valid exercises of that power, entailing a necessary delegation of some authority to agencies so that they can tailor their actions to the needs of the affected localities. To deny Congress the authority to take this reasonable measure would be an unwarranted judicial intrusion upon Congress's constitutionally-mandated prerogative to address racial inequities.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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